Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

(1)

No. 03 61

In The
Supreme Court of the United States

JOHN TORTORELLI,

Petitioner,

v.

STATE OF WASHINGTON

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR WRIT OF CERTIORARI

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

JAMES E. LOBSENZ
Of Counsel
CARNEY BADLEY SPELLMAN, P.S.
700 Fifth Avenue, Suite 5800
Seattle, Washington 98104-5017
(206) 607-4305

Attorneys for Petitioner

91 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can a state preempt federal maritime law by criminalizing the salvage or finding of objects lost on navigable waters, and by asserting that title to such property is vested in the state without a showing that such has been truly abandoned and is actually embedded in the state's lands?

2. Does the Submerged Lands Act, 43 U.S.C. §§ 1301(e), 1311(a), authorize states to lay claim to submerged logs and trees that would otherwise be subject to the general maritime law of salvage or finds, reserved by the Act, id. § 1314?

TABLE OF CONTENTS

Page

Questions Presented for Review . . . . . (i)
Opinions Below 1
Statement of Jurisdiction 1
Constitutional Provision and Statute Involved 2
Statement 2

Reasons for Granting the Petition 10

STATE ESCHEATS OF PROPERTY ON SUBMERGED LANDS, AT VARIANCE WITH ADMIRALTY DOCTRINES AND ACTS OF CONGRESS, CHALLENGE THE NATIONAL UNIFORMITY OF MARITIME LAW 10

A. Courts have divided on whether a state's assertion of title over property lost on its navigable waters must be consistent with general maritime law 11

B. The state court's reliance on the Submerged Lands Act as the basis of title to sunken trees is manifestly contradicted by the statute and is in conflict with the rulings of other courts 21

Conclusion 26

TABLE OF AUTHORITIES

CASES

Alaska v. United States, Orig. 128
(Bill of Complaint filed June 9, 2000) 22
American Dredging Co. v. Miller,
510 U.S. 443 (1994) 12
Bywater v. A Raft of Piles, 42 F. 917 (D. Wash. 1890) 13
The BROTHER JONATHAN, 102 F.3d 379 (9th Cir. 1996) . . 19
California v. Deep Sea Research, Inc.,
523 U.S. 491 (1998) . . . . . passim
Chance v. Certain Artifacts Found and Salvaged from the NASHVILLE a/kla The Rattlesnake,
606 F. Supp. 801 (S.D.Ga.1984), aff'd,
775 F.2d 1511 (11th Cir.1985) 15
Cinque Bambini Partnership v. Mississippi,
491 So.2d 508 (Miss. 1986), aff'd sub. nom.
Phillips Petroleum Co. v. Mississippi,
482 U.S. 469 (1988) 3
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 23
Colby v. Todd Packing Co.,
77 F. Supp. 956 (D. Alaska 1948) 13
Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.,
974 F.2d 450 (4th Cir. 1992) 12
Commonwealth v. Maritime Underwater Surveys, Inc.,
531 N.E.2d 549 (Mass. 1988) 14
Cope v. Vallette Dry-Dock Co., 119 U.S. 625 (1887) 13
Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) 24
Eads v. Brazelton, 22 Ark. 499 (1861) 9
Eastman v. Harris, 4 La. Ann. 193 (1849) 17
Favorite v. Miller, 407 A.2d 974 (Conn. 1978) 15
Ferguson v. Ray, 77 P. 600, 601 (Or. 1904) 15
Fifty Thousand Feet of Timber,
9 F. Cas. 47 (D. Mass. 1871) (No. 4783) 13
Goodard v. Winchell, 52 N.W. 1124 (Iowa 1892) 15

Gutierrez v. Ada, 528 U.S. 250 (2000) 23
Hirsch v. Maryland Dep't of Natural Resources,
416 A.2d 10 (Md. 1980) 3
Houseman v. The Cargo of the Schooner NORTH CAROLINA,
40 U.S. (15 Pet.) 40 (1841) 12
Hughes v. Washington, 389 U.S. 290 (1967) 22
In re Winship, 397 U.S. 358 (1970) 25
Klein v. Unidentified Wrecked and Abandoned Sailing Vessel,
758 F.2d 1511 (11th Cir. 1985) 15
Martha's Vineyard Scuba H.Q. v. Unidentified Wrecked and Abandoned Steam Vessel,
833 F.2d 1059(1st Cir.1987) 12
Maulsby v. Cook, 235 P. 23 (Wash. 1925) 18
Mobile Transp. Co. v. City of Mobile,
30 So. 645 (Ala. 1900) 3
Muntz v. A Raft of Timber, 15 F. 555 (C.C.E.D. La. 1883) . 13
A Raft of Spars,
20 F. Cas. 173 (S.D.N.Y. 1849) (No. 11529) 13
Scott v. Willson, 3 N.H. 321 (1825) 18
Shepard's Point Land Co. v. Atlantic Hotel,
44 S.E. 39 (N.C. 1903) 3
Somers v. Kane, 202 N.W. 27 (Minn. 1925) 17
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 12
Southwestern Sugar & Molasses Co. v. River Terminals Corp.,
360 U.S. 411 (1959) 10
Tidewater Salvage, Inc. v. Weyerhaeuser Co.,
633 F.2d 1304 (9th Cir. 1980) 13
The SABINE, 101 U.S. 384 (1880) 13
Tome v. Four Cribs of Lumber,
24 F. Cas. 18 (C.C.D. Md. 1853) (No. 14083) 13
Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel,
569 F.2d 330 (5th Cir. 1978) 12, 14
United States v. California, 332 U.S. 19 (1947) 3
United States v. Locke, 529 U.S. 89 (2000) 16, 20
United States v. Louisiana, 363 U.S. 1 (1960) 24

United States v. Michigan,
471 F. Supp. 192 (W.D. Mich. 1979) 23
United States v. Ray, 423 F.2d 16 (5th Cir. 1970) 23
United States v. Tyndale, 116 F. 820 (1st Cir. 1902) 14
West Branch Lumberman's Exch. v. Enterline,
24 A. 735 (Pa. 1892) 18
Whitman v. Muskegon Log Lifting & Operating Co.,
116 N.W. 614 (Mich. 1908) 17
Whitmire v. Cobb, 88 F. 91 (5th Cir. 1898) 13

FEDERAL CONSTITUTION AND STATUTES

U.S. Const.
Art. I, § 8, cl. 3 2
Art. III, § 2 2
16 U.S.C. § 3203 23
28 U.S.C. § 1257 1
Submerged Lands Act,
43 U.S.C. § 1301-1315 . . . . . passim
43 U.S.C. § 1301 . . . . . passim
43 U.S.C. § 1311 . . . . . 3, 22
43 U.S.C. § 1314 . . . . . 4, 22, 24, 25
Abandoned Shipwreck Act,
43 U.S.C. § 2101 14
43 U.S.C. § 2102 15
43 U.S.C. § 2105 15

LEGISLATIVE MATERIAL

H.R. Rep. No. 100-514, 100th Cong., 2d Sess., Pt. 2 15

STATE CONSTITUTIONS AND STATUTES

Ala. Code § 41-9-249.1 18
Alaska Stat. Ann. § 45.50.230 17

Alaska Stat. Ann. § 45.50.235 . . . . . 4, 16
Cal. Civ. Code Ann. § 670 3
Cal. Pub. Res. Code Ann. § 6313 . . . . . 19, 20
Cal. Pub. Res. Code Ann. §§ 4855 . . . . . 4, 17
Fla. Stat. Ann. § 267.061 18
Fla. Stat. Ann. § 370.03 3
Ga. Code Ann. § 12-3-80 18
La. Rev. Stat. Ann. § 9:1101 3
La. Rev. Stat. Ann. § 41:1605 18
Me. Rev. Stat. Ann. tit. 1, § 3 3
Me. Rev. Stat. tit. 12, § 1867 . . . . . 4, 17
Mich. Compiled Laws Ann. § 324.32602 . . . . . 4, 17
Minn. Stat. Ann. § 103G.650 . . . . . 4, 17
Miss. Code Ann. § 39-7-17 18
Miss. Code Ann. § 89-17-1 4
Mont. Code Ann. § 70-1-202 4
N.C. Gen. Stat. § 121-22 18
N.H. Rev. Stat. Ann. § 1:16 3
Or. Rev. Stat. § 274.025 3
R.I. Gen. Laws § 42-45.1-4 3
S.C. Code Ann. § 54-7-620 18
Tex. Nat. Res. Code Ann. § 11.012 3
Va. Code Ann. § 10.1-2214 18
Va. Code Ann. § 28.2-1200 3

Wash Const. Art. XVII, § 1 . . . . . passim
Wash. Rev. Code Ann.
§ 9A.56.020 . . . . . 6, 7
§ 27.53.045 18
§ 76.36.010 . . . . . 2, 4
§ 76.36.020 . . . . . passim
§ 76.36.060-.130 5
§ 76.40.010-.910 5

Wis. Stat. Ann. § 170.12(2) 4, 17

PETITION FOR WRIT OF CERTIORARI

The Petitioner, John Tortorelli, respectfully prays that a writ of certiorari issue to review the April 10, 2003, judgment and opinion of the Supreme Court of Washington in the above-captioned proceeding.

OPINIONS BELOW

Petitioner seeks review of the opinion and judgment of the Washington Supreme Court of April 10, 2003, styled as *In re the Matter of the Personal Restraint of John Tortorelli* (Docket No. 71251-4), and reported at 149 Wash.2d 82 and 66 P.3d 606 (Wash. S.Ct. April 10, 2003), and reprinted at App. 1a. A prior decision of the Washington Court of Appeals, Division I, on Petitioner's personal restraint petition was reported at 104 Wash. App. 1003 (Wash. Ct. App. Jan. 2, 2001), and is reprinted at App. 16a.

A direct appeal of Petitioner's criminal conviction was decided by the Washington Court of Appeals, Division I, in *State v. Tortorelli*, and was reported at 86 Wash. App. 1046 (Wash. Ct. App. June 9, 1997), and is reprinted here at App. 32a. Review of that decision was denied without comment by the Washington Supreme Court at 137 Wash.2d 1011, 978 P.2d 1100 (Wash. S.Ct. Feb. 2, 1999).

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Supreme Court of Washington of April 10, 2003. The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition implicates the power of states to fashion substantive rules affecting the conduct of maritime commerce, in contravention of the Constitution's grant of admiralty jurisdiction to the federal courts in Article III, section 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."), and Congress's Commerce Clause powers under Article I, section 8, clause 3 ("Congress shall have the Power . . . to regulate Commerce . . . among the several States. . . .").

Specifically at issue is the State of Washington's assertion of title over sunken logs and trees, otherwise subject to the federal maritime law of salvage and finds. Washington's statute asserting such title is Wash. Rev. Code Ann. §§ 76.36.010 & 76.36.020 (West 1994 & Supp. 2003), reprinted at App. 49a-50a. These provisions were ostensibly legislated pursuant to the State of Washington's constitutional provision declaring state ownership over navigable waters and beds. WASH. CONST. Art. XVII, § 1, reprinted at App. 51a.

This Petition also involves construction of the Submerged Lands Act (SLA) of 1953, 43 U.S.C. §§ 1301-1315, the relevant provisions of which are reprinted at App. 52a-56a.

STATEMENT

1. a. As does virtually every state in the Union, Washington has claimed ownership to the beds and shores of all navigable waters within its jurisdiction. WASH. CONST. Art. XVII, § 1 (adopted 1889); App. 51a. While Washington is the only state to constitutionalize this assertion of ownership,

other states accomplish the same result through legislation. See, e.g., Cal. Civ. Code Ann. § 670 (West 1982 & Supp. 2003); Fla. Stat. Ann. § 370.03 (West 2000 & Supp. 2002); La. Rev. Stat. Ann. § 9:1101 (West 2000 & Supp. 2003); Me. Rev. Stat. Ann. tit. 1, § 3 (West 1989 & Supp. 2003); N.H. Rev. Stat. Ann. § 1:16 (2002); Or. Rev. Stat. § 274.025 (2001 & Supp. 2003); R.I. Gen. Laws § 42-45.1-4(b) (2002); Tex. Nat. Res. Code Ann. § 11.012 (West 2001 & Supp. 2003); Va. Code Ann. § 28.2-1200 (2003). Other states derive their title from colonial charters, see, e.g., *Hirsch v. Maryland Dep't of Natural Resources*, 416 A.2d 10, 12 (Md. 1980); *Shepard's Point Land Co. v. Atlantic Hotel*, 44 S.E. 39, 41 (N.C. 1903), or by judicial recognition of the equal footing doctrine. See *Mobile Transp. Co. v. City of Mobile*, 30 So. 645, 646 (Ala. 1900); *Cinque Bambini Partnership v. Mississippi*, 491 So.2d 508, 511-12 (Miss. 1986), aff'd sub. nom. *Phillips Petroleum Co. v. Mississippi*, 482 U.S. 469 (1988).

In the wake of this Court's decision in *United States v. California*, 332 U.S. 19 (1947), Congress legislated the Submerged Lands Act (SLA), 43 U.S.C. §§ 1301 et seq., which confirmed and specified the states' rights over lands beneath navigable waters. See id. § 1301(a); App. 53a. The SLA made clear that states acquired "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters. . . . and . . . the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law. " Id. § 1311(a); App. 54a.

"Natural resources" was defined in the SLA to include, "without limiting the generality thereof, oil, gas, and all other

minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life. . . ." Id. § 1301(e); App. 53a. Despite this grant, the SLA reserved to the United States "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce [and] navigation. . . ." Id. § 1314(a); App. 55a.

b. The State of Washington in 1890 legislated an elaborate scheme to regulate the identification and recovery of floating and submerged logs and trees. Today, eight other states have statutes substantially similar to Washington's log escheat statute.[1] Additional states legislatively assert title over shipwrecks situated on their submerged lands.

One provision of the Washington legislation is an assertion of title over "unbranded or unmarked stray logs or forest products. . . ." Wash. Rev. Stat. § 76.36.020 (West 1994 & Supp. 2003) (originally enacted in 1890 Wash. Acts 110); App. 50a. The relevant "waters of the state" in or upon which the log statute is to apply are defined as "any and all bodies of bodies of fresh and salt water within the jurisdiction of the state capable of being used for the transportation or storage of forest products, including all rivers and lakes and their tributaries, harbors, bays, bayous, and marshes." Id. § 76.36.010(7); App. 50a. Some additional provisions of the

---

[1] See Alaska Stat. § 45.50.235(a) (Michie 2002); Cal. Pub. Res. Code Ann. §§ 4851-4855 (West 2001 & Supp. 2003); Me. Rev. Stat. tit. 12, § 1867(2) (West 1994 & Supp. 2003); Mich. Compiled Laws Ann. § 324.32602 (West 1999 & Supp. 2003); Minn. Stat. Ann. § 103G.650 (subd. 2) (West 1997 & Supp. 2003); Miss. Code Ann. § 89-17-1 (2003); Mont. Code Ann. § 70-1-202 (2002); Wis. Stat. Ann. § 170.12(2) (West 1997 & Supp. 2003).

statute are devoted to regulations for the registration and enforcement of brands for logs and forest products. Id. §§ 76.36.060-.130.

Yet another aspect of the Washington legislation was the creation of a "log patrol," in which individuals were licensed by the state to recover lost or stray logs, and to receive a bounty from the state for such recovery. See id. §§ 76.40.010-.910 (repealed 1994). These log patrol provisions were fully and finally repealed in 1994, see 1994 Wash. Acts ch. 163, § 6, and although in force during some of the relevant periods of this case, they play no dispositive role in the matter, and are not at issue in this Petition.

2. In the early 1990's, the Petitioner, John Tortorelli, was engaged in the business of salving and retrieving submerged stray logs and tree remnants from Lake Washington, a navigable water. App. 1a. The stray logs had been cut and rafted in lumbering operations within the last 100 years, and had been stored in log yards. But they became waterlogged and sank to the bottom, coming to rest on the lake-bed. App. 1a-2a; 17a. The submerged trees had once been growing on an island in the middle of the lake. But due to an earthquake that occurred approximately 1100 years ago, that portion of the island broke off and fell into the lake, and the trees which had been growing on that land ended up underwater, strewn upon the lake-bed like spilled matchsticks. App. 2a; 8a-9a; 14a.

In 1991, Tortorelli had purchased equipment from an established log salvor, and entered into association with that entity. App. 2a-3a. He cooperated with forestry scientists in the identification of sunken trees. App. 4a. In June 1992, certain disputed conversations occurred between Tortorelli and representatives of Washington's Department of Natural Resources (DNR), in which the issue of the State's claim of right to stray logs and submerged tree remnants was raised.

App. 5a.

3. a. In October, 1992, DNR searched Tortorelli's home and salvage operations, and seized records, from which they concluded that he had illegally retrieved logs and trees. App. 5a. In August 1994, Tortorelli was charged with eight criminal counts, including the crimes of profiteering, theft of and trafficking in both submerged trees and stray logs, as well as making a false filing. App. 5a; 17a-19a n.1. One charge was later dropped. App. 5a n.1. With the exception of the false filing charge, all the other counts were factually and legally dependent on the state proving that Tortorelli had taken "the property of another," as required by the statute under which he was charged. Wash. Rev. Stat. Ann. § 9A.56.020(1)(a) (West 1994 & Supp. 2003); see also App. 1a, 6a. Tortorelli was not charged under subsection (c), which covers misappropriation of lost property. App. 6a.

At Tortorelli's criminal trial, he took no position on the State's ownership of the stray logs or submerged trees, neither contesting nor conceding that point, leaving it to the state to prove all material elements of its case. App. 5a; 16a. Tortorelli was nonetheless convicted on all counts, was sentenced to eight concurrent terms of 43 months in prison, and ordered to pay restitution. App. 5a. Petitioner has, in fact, served his sentence of 28 and a half months of incarceration, but still remains obligated to pay $188,031.27 in restitution to the State of Washington.

b. Tortorelli took a direct appeal of his conviction. App. 32a. The Washington Court of Appeals, Division I, ostensibly declined to review the issue of whether the State had proven the material element of the ownership of the logs and trees, because of an inadequate record and lack of briefing. App. 34a. Tortorelli's other arguments raised before the

Washington Court of Appeals[2] are not material to this Petition. The Washington Court of Appeals thus affirmed Tortorelli's convictions in all respects. App. 48a. The Washington Supreme Court then denied discretionary review of the direct appeal. 137 Wash.2d 1011, 978 P.2d 1100 (1999).

c. In Washington, collateral relief from criminal convictions is procured through a personal restraint petition, initiated in the Washington Court of Appeals. In a 2001 decision, that court concluded that there had been sufficient evidence to conclude that the logs and trees that Tortorelli had taken were "the property of another" under Wash. Rev. Stat. § 9A.56.020(1). App. 21a. The appeals court concluded that the State of Washington had asserted a claim to both the logs and trees, and had communicated such a claim to Tortorelli, App. 21a-23a, but did not otherwise address the question of whether the State's claim of title was valid. The appeals court also made clear that the State's ostensible reliance on the log patrol statute was not essential to Tortorelli's conviction, the predicate question of the State's title to the logs and trees having been satisfied. App. 24a-25a.

Tortorelli's additional arguments in the personal restraint petition proceedings[3] are not relevant to this Petition, and are not advanced here. The court of appeals dismissed the

---

[2] These included a violation of attorney-client privilege by the State, App. 36a-40a, an improper charge under a general criminal statute, App. 40a-42a, a breach of the double jeopardy prohibition, App. 42a-45a, and his excessive sentencing, App. 45a-48a.

[3] These included an assertion of ineffective assistance of counsel, App. 25a-28a, and the materiality of any false filing made by Tortorelli, App. 29a-31a.

personal restraint petition. App. 31a.

d. Tortorelli then sought review of his personal restraint petition in the Washington Supreme Court, that tribunal granted review, and a divided court dismissed the petition. App. 13a. The Washington Supreme Court noted that the issue was one of first impression for it and ruled that, as a matter of law, the State of Washington owned the stray logs and submerged trees retrieved by Tortorelli, and thus they were "the property of another." App. 6a. The court relied upon Washington's constitutional provision declaring ownership of navigable waters and beds, WASH. CONST. Art. XVII, § 1; App. 51a, as well as the provisions of the federal Submerged Lands Act (SLA), granting the states title to natural resources found under their navigable waters. App. 6a-7a.

In particular, the Washington Supreme Court held that the SLA's provision defining "natural resources," 43 U.S.C. § 1301(e), included the submerged trees and logs. App. 7a-8a. The sunken trees, the court concluded, whether or not attached or embedded to Washington's submerged lands, were within the SLA's grant of title to the state. Additionally, the Washington Supreme Court held that even though the state's title over the sunken logs might not be justified under the SLA's "natural resources" provision, it was supported by the state's log escheat statute at Wash. Rev. Stat. Ann. § 76.36.020 (West 1994 & Supp. 2003); App. 50a.

Lastly, the court rejected the argument that the federal maritime law of salvage and finds preempted Washington's assertion of title over logs and trees lost and recovered on navigable waters and the state's criminalization of salvage operations for such property. App. 8a-9a. The court held, without further elaboration, that "we find the law of finds must

give way to our state and federal constitutions and laws, and we decline to apply it to these logs." App. 9a. The Washington Supreme Court thus ruled that the State of Washington could make a blanket assertion of title to sunken logs and trees without reference to whether the particular marine property was abandoned (and thus subject to the law of finds or the State's escheat), or whether it was actually embedded in the State's submerged lands. App. 9a. After dismissing Petitioner's other arguments, none of which are submitted for review here, the Washington Supreme Court dismissed the personal restraint petition. App. 13a.

e. The court's decision drew a strong dissent by Justice Sanders, joined by Chief Justice Alexander. App. 14a. The dissent observed that the majority opinion too readily dismissed what it characterized as a "common law" assertion of title based on the law of finds. "Under this doctrine, 'the finder of things that have never been appropriated, or that have been abandoned by a former occupant, may take them into his possession as his own property; and the finder of any thing casually lost is its rightful occupant against all but the real owner.'" App. 14a (quoting *Eads v. Brazelton,* 22 Ark. 499, 501 (1861)). The dissent concluded that "[b]ecause the ancient submerged trees fell into Lake Washington prior to the existence of the state and federal governments and none of the previous inhabitants lay claim to the trees, Tortorelli asserts ownership of the submerged trees under the law of finds." App. 14a.

The dissent also noted that the majority's conclusion that the State held title to stray logs and sunken trees was necessarily hinged on a flawed construction of the Submerged Lands Act's definition of "natural resources," 43 U.S.C. § 1301(e); App. 53a. Justice Sanders remarked that

> [a]s the majority notes, the act provides a nonexclusive definition of "natural resources."

> However, its illustrative examples, "oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life," 43 U.S.C. § 1301(e), are all resources that grow or evolve naturally below water, rather than resources that once grew on dry land and then happened to end up beneath the surface by accident or natural disaster.
>
> The majority's conclusion is counterintuitive. The Submerged Lands Act speaks of minerals and marine life, not of sunken trees.

App. 14a-15a. The dissent would thus have ruled that the State of Washington could not have proven a material element of the charges against Tortorelli: that he had taken "the property of another" by divesting the State of what it rightfully owned. App. 15a.

REASONS FOR GRANTING THE PETITION

STATE ESCHEATS OF PROPERTY ON SUBMERGED LANDS, AT VARIANCE WITH ADMIRALTY DOCTRINES AND ACTS OF CONGRESS, CHALLENGE THE NATIONAL UNIFORMITY OF MARITIME LAW

This Petition calls upon the Court to once again exercise its authority as the ultimate guardian of the integrity and coherence of the nation's admiralty law. See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959) ("The issue is one of importance in the development of the law maritime, as to which we have

large responsibilities, constitutionally conferred. . . ."). It also raises issues this Court has already granted certiorari to resolve, although without actually ruling on the merits of these concerns. See *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501, 508-09 (1998).

Starkly presented here is whether a state may prohibit – indeed, go so far as to criminalize – a traditional maritime activity that has been within the admiralty jurisdiction of the federal courts and the province of Congress to regulate for centuries. The State of Washington, as have many other states in the Union, has done precisely that with the salvage and recovery of logs and other forest products, based on a sweeping assertion of title to property lost on navigable waters wholly in contradiction with the general maritime law and relevant federal statutes. At stake is the uniformity of the federal maritime law as well as the proper scope of state claims to natural resources on their submerged lands.

A. Courts have divided on whether a state's assertion of title over property lost on its navigable waters must be consistent with general maritime law.

1. As already noted, see *supra* at 2-3, every state in the Union has asserted ownership over submerged lands underlying navigable waters within its territorial jurisdiction. This has led to disputes in which states have laid claim to property lost on those waters, the recovery of which would normally be regulated by the maritime law. This case – involving title to sunken stray logs and submerged trees – is part of a broader pattern in which states have purported to legislate rules for the escheat of lost property on navigable waters, even though such state legislation is manifestly at

variance with the general maritime law, as confirmed by various Acts of Congress.

a. For over a hundred and fifty years the salvage or recovery of property lost on navigable waters has been governed by the general maritime law of the United States, and disputes over the salvage and finds of such property are encompassed within the admiralty jurisdiction of the federal courts. See *Houseman v. The Cargo of the Schooner NORTH CAROLINA*, 40 U.S. (15 Pet.) 40, 48 (1841). Whether the lost property is legally abandoned (and is covered under the maritime law of finds; see *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 459-61 (4th Cir. 1992); *Martha's Vineyard Scuba H.Q. v. Unidentified Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir.1987); *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978)), or still has a legal owner (in which case it is governed by the law of salvage), the disposition of such property is governed under these "characteristic features" of the admiralty. See *American Dredging Co. v. Miller*, 510 U.S. 443, 446-47 (1994) (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917) (a state law which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations" is void)).

The fact that this case involves logs and forest products situated on navigable waters does not disparage the maritime aspect of this activity, nor lend any strength to a state's assertion of title over such items. Rafts of timber on navigable waters have been consistently regarded as property subject to the maritime law of salvage. See *Tidewater Salvage, Inc. v.*

Weyerhaeuser Co., 633 F.2d 1304 (9th Cir. 1980); *Whitmire v. Cobb*, 88 F. 91 (5th Cir. 1898); *Muntz v. A Raft of Timber*, 15 F. 555 (C.C.E.D. La. 1883); *Bywater v. A Raft of Piles*, 42 F. 917 (D. Wash. 1890); *Fifty Thousand Feet of Timber*, 9 F. Cas. 47 (D. Mass. 1871) (No. 4783); *A Raft of Spars*, 20 F. Cas. 173 (S.D.N.Y. 1849) (No. 11529); but see *Tome v. Four Cribs of Lumber*, 24 F. Cas. 18, 23-24 (C.C.D. Md. 1853) (No. 14083) (Taney, Circuit Justice) (rejecting salvage, on the facts of that case). This rule has been extended by federal courts to any property lost on navigable waters that has even a remote connection to maritime commerce or activities. See *Colby v. Todd Packing Co.*, 77 F. Supp. 956 (D. Alaska 1948) (fish trap frames subject to salvage).

Most importantly, the applicability of marine salvage to broad classes of property on navigable waters has been recognized by this Court. In *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887), the Court noted that while the only *structures* subject to salvage were those associated with vessels, other sorts of property lost at sea were subject to the maritime law of salvage. See id. at 630 (citing approvingly to *A Raft of Spars*, 20 F. Cas. at 173; and *Fifty Thousand Feet of Timber*, 9 F. Cas. at 47, while distinguishing Chief Justice Taney's opinion in *Tome*, 24 F. Cas. at 23-24, as being reflective of a local custom and not a general rule against the applicability of salvage to logs).

b. Objects lost on navigable waters that have not been legally abandoned thus still have an owner, and are subject to the maritime law of salvage. A salvor in these circumstances would be entitled to a generous salvage award from a federal admiralty court. See *The SABINE*, 101 U.S. 384 (1880). United States courts have consistently ruled that sovereigns may not divest title over private property that has

not been legally abandoned, exercising some sort of sovereign prerogative, or "droit of the admiralty" over property lost on navigable waters and cast upon the shore or resting on bottom lands. See *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 342-43 (5th Cir.1978); *United States v. Tyndale*, 116 F. 820, 822-23 (1st Cir. 1902). This rejection of a sovereign prerogative doctrine has also been made by the Massachusetts Supreme Judicial Court, in a decision which the Washington Supreme Court cited in its opinion, but otherwise chose to ignore and failed to distinguish. See App. 9a (citing *Commonwealth v. Maritime Underwater Surveys, Inc.*, 403 Mass. 501, 531 N.E.2d 549 (1988)).

For sovereigns that would assert a claim of ownership over property that has been lost on navigable waters, and has no current owner, the standard of abandonment is exacting, and is governed by the general maritime law, and not by state legislation or common law. As this Court has recently observed, whether an object lost on water is, in fact, abandoned and has no legal owner, is a question governed by the general maritime law. In *California v. Deep Sea Research, Inc.*, this Court construed the term "abandoned," as used in the Abandoned Shipwreck Act, 43 U.S.C. § 2101(b) (2002) (referring to wrecks "which have been deserted and to which the owner has relinquished ownership rights with no retention"), as "conform[ing] with its meaning under admiralty law." 523 U.S. at 508.

An equally significant qualification on a sovereign's right to escheat property lost at sea is that the object be embedded on its shores or in its beds. In its common law form, the embeddedness rule has been embraced by a number of state supreme courts as a limitation on the state's ability to simply declare that title to certain classes of abandoned property are

vested in the sovereign. See, e.g., *Favorite v. Miller*, 407 A.2d 974, 978 (Conn. 1978); *Goodard v. Winchell*, 52 N.W. 1124, 1125-26 (Iowa 1892); *Ferguson v. Ray*, 77 P. 600, 601 (Or. 1904). Despite this authority, the Washington Supreme Court held that "the law of finds must give way to our state and federal constitutions and laws, and we decline to apply it to these logs." App. 9a.

This embeddedness exception to the common law of finds has been recognized by federal courts as an integral part of the general maritime law on this subject. See *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985). In fashioning the terms of the Abandoned Shipwreck Act (ASA) of 1987, Congress had the opportunity to define the concept of embeddedness in relation to the Act's requirement that a shipwreck be *both* abandoned *and* embedded before the federal government would assert title in it and then quitclaim it to the state in which waters it was found. See 43 U.S.C. § 2105(a)(1). Indeed, embeddedness was defined in the ASA as "firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." Id. § 2102(a). Congress legislated this provision to be "consistent with the recognized exception from the law of finds for shipwrecks embedded in submerged lands of a state." H.R. Rep. No. 100-514, 100th Cong., 2d Sess., Pt. 2, reprinted in 1988 U.S.C.C.A.N. 370, 376 (citing *Chance v. Certain Artifacts Found and Salvaged from the NASHVILLE a/kla The Rattlesnake*, 606 F. Supp. 801 (S.D.Ga.1984), aff'd, 775 F.2d 1511 (11th Cir.1985)).

2. The State of Washington has, via its constitution and laws, purported to exercise a sovereign prerogative over

property lost on its navigable waters, including the logs and trees at issue in this case. See WASH. CONST. Art. XVII, § 1 ("assert[ing] . . . ownership to the beds and shores of all navigable waters in the state. . . ."); Wash. Rev. Stat. Ann. § 76.36.020 ("Unbranded or unmarked stray logs or forest products become the property of the state when recovered."). This assertion of an escheat was accomplished through a broad claim of title, one made without requiring the state to prove *both* that the logs and trees that Tortorelli recovered were legally abandoned by their original owner *and* embedded in the beds of Washington's navigable waters. Unwilling to qualify its assertion of lost property to that which had been both abandoned and embedded, in conformance with the general maritime law, Washington has instigated a broad intrusion of state authority into federal admiralty law.

If the State of Washington were alone in pursuing this strategy, it might still merit this Court's review, as this Court exercised in the face of Washington's navigation regulations for oil tankers in state waters, largely struck-down in *United States v. Locke*, 529 U.S. 89 (2000). But Washington is among a fairly large group of states that have sought to displace the general maritime law of salvage and finds for lost property on their navigable waters by unilaterally legislating broad escheat statutes for such property.

a. A number of states have, by statute, asserted an escheat to logs, trees, and related timber property lost on navigable waters. Some jurisdictions have made the same claim to unbranded logs, irrespective of their ultimate legal status as abandoned and without reference to their embedded status. See, e.g., Alaska Stat. Ann. § 45.50.235 (Michie 2002) ("Timber property that is unbranded or on which a brand is not distinguishable and that is located in a coastal

water, lake, river, creek, or other waterway of the state or on state owned coastline is presumed to be the property of the state."). Other jurisdictions assert title to timber products that are merely "resting on the submerged lands owned by the state," without a showing of actual embeddeness or of legal abandonment. See, e.g., Me. Rev. Stat. Ann. tit. 12, § 1867(2) (West 1994 & Supp. 2003); Mich. Comp. Laws Ann. § 324.32602 (West 1999 & Supp. 2003) ("This state reserves to itself title and ownership of all submerged logs lying on or over, embedded in, or buried under unpatented lands."); Wis. Stat. Ann. § 170.12(2) (West 1997 & Supp. 2003). Yet other states prescribe a presumptive period of abandonment, after which the timber products on navigable waters are forfeited to the state. See, e.g., Alaska Stat. Ann. § 45.50.230(a)(2) (90-day period) (Michie 2002); Cal. Pub. Res. Code Ann. § 4855 (West 2001 & Supp. 2003) (six months); Minn. Stat. Ann. § 103G.650(2) (West 1997 & Supp. 2003) ("title and ownership of a log or historical artifact that rests for more than one year on submerged land owned by the state in inland waters is considered abandoned property that has forfeited to the state.").

The Washington Supreme Court's decision is also in conflict with those state supreme courts that have ruled that, as between private parties, title to stray logs does not shift, absent proof of both abandonment and embeddeness, and notwithstanding an escheat statute to the contrary. See, e.g., *Eastman v. Harris*, 4 La. Ann. 193 (1849); *Whitman v. Muskegon Log Lifting & Operating Co.*, 116 N.W. 614, 615-16 (Mich. 1908); *Somers v. Kane*, 202 N.W. 27, 28 (Minn. 1925). Alternatively, some state supreme courts have validated log escheat statutes, where both the requisites of legal abandonment and actual embeddedness were provided

for. See *Scott v. Willson*, 3 N.H. 321 (1825); *West Branch Lumberman's Exch. v. Enterline*, 24 A. 735 (Pa. 1892). Ironically, this was the posture of Washington's own property law, at least prior to the decision for which review is sought here. See *Maulsby v. Cook*, 235 P. 23, 25 (Wash. 1925).

b. It should be also noted that some states also assert blanket title to shipwrecks and other artifacts, typically without reference to a standard of abandonment in conformance with the general maritime law and a requirement of proof that the wreck is embedded in the states' public lands. See, e.g., Ala. Code § 41-9-249.1(b) (2003) (purporting to override any conflicting laws of salvage); Fla. Stat. Ann. § 267.061(1)(b) (West 2003) ("all treasure trove, artifacts, and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state. . . ."); Ga. Code Ann. § 12-3-80 (2003) (presumption of abandonment after 50 years; no embeddeness requirement); La. Rev. Stat. Ann. § 41:1605(A) (West 1990 & Supp. 2003); Miss. Code Ann. § 39-7-17 (2003) (overriding salvage law); N.C. Gen. Stat. § 121-22 (2003) (presumption of abandonment after 10 years); S.C. Code Ann. § 54-7-620(43)(b)(i) (2003) (providing for embeddedness rule, but presuming abandonment after 50 years); Va. Code Ann. § 10.1-2214(A) (Michie 1993 & Supp. 2003) ("'Underwater historic property' means any submerged shipwreck, vessel, cargo, tackle or underwater archaeological specimen . . . that has remained unclaimed on the state-owned subaqueous bottom. . . ."); Wash. Rev. Code Ann. § 27.53.045 (West 1997 & Supp. 2003) (presumption of abandonment after 30 years).

Prior to the Washington Supreme Court's decision in this case, the most serious state challenge to the supremacy of

the federal maritime law of salvage and finds was California's historic wreck statute. See Cal. Pub. Res. Code Ann. § 6313 (West 2001 & Supp. 2003). This provision purports to lay claim to "all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California. . . ." Id. § 6313(a). These wrecks, sites and resources are to

> be given the broadest possible meaning, to include any submerged object, structure, building, watercraft, or vessel and any associated cargo, armament, tackle, fixture, human remains, or remnant thereof, or any site, area, person, or place, which is historically or archaeologically significant, or significant in the prehistory or history or exploration, settlement, engineering, commerce, militarism, recreation, or culture of California and which is partially or wholly embedded in or resting on state submerged or tidal lands.

Id. § 6313(b). In addition to relaxing the embeddedness requirement so as to include property merely "resting on state submerged or tidal lands," California has presumptively declared abandoned any property "remaining in state waters for more than 50 years. . . ." Id. § 6313(c).

In *California v. Deep Sea Research, Inc.*, this Court granted certiorari, in part, to review the question of whether California could take title to a valuable shipwreck, by "'assert[ing] that the Brother Jonathan is on its submerged lands and that ... § 6313 vests title in the State to abandoned shipwrecks on its submerged lands.'" 523 U.S. at 498 (quoting the lower court opinion in *The BROTHER JONATHAN*, 102 F.3d 379, 385 (9th Cir 1996)). More specifically, the issue was whether section 6313 was preempted by the exacting standards of the Abandoned

Shipwreck Act, requiring proof of both that the object lost at sea is legally abandoned (as that is understood under the maritime law) and is actually embedded in the state's submerged lands. See id. at 500 ("We granted certiorari to address whether a State's Eleventh Amendment immunity in an in rem admiralty action depends upon evidence of the State's ownership of the res, and to consider the related questions whether the Brother Jonathan is subject to the ASA and whether the ASA pre-empts § 6313.").

Ultimately, however, it was unnecessary for this Court to deal with the preemption of California's claim to lost property on its submerged lands. After unanimously deciding that the Eleventh Amendment did not preclude an in rem admiralty action in federal court, where the disputed property was not within the actual possession of a state, see id. at 507-08, and that the standard of abandonment mentioned in the ASA is coextensive with that provided in the general maritime law, see id. at 508, the Court, Justice O'Connor writing, observed:

> Our grant of certiorari also encompassed the question whether the courts below properly concluded that the ASA pre-empts § 6313, which apparently operates to transfer title to abandoned shipwrecks not covered by the ASA to the State. Because the District Court's full consideration of the application of the ASA on remand might negate the need to address the pre-emption issue, we decline to undertake that analysis.

Id. at 508-09.

3. This Petition thus presents the same question earlier accepted for review by this Court in *Deep Sea Research*, but does so in a manner more likely to be a successful vehicle for

resolution of this issue. First, no complications of sovereign immunity cloud the case. Next, the Washington constitutional provision and statutes in question here represent an even more audacious intrusion into federal maritime law than the California law featured in *Deep Sea Research*. Petitioner's criminal conviction clearly turned on the State of Washington establishing legal ownership over the logs and trees he recovered, and absent jury findings on the abandonment and embeddedness of the forest products, Washington's courts had recourse only to a sweeping claim of title which purposefully ignored the relevant admiralty law requirements.

Indeed, the State of Washington has gone so far as to actually criminalize conduct that would normally receive the approbation of federal admiralty courts. This pattern of state arrogation of federal maritime law authority was discredited by this Court as recently as three years ago in *United States v. Locke*, 529 U.S. 89 (2000), but given the continued pace of state legislation in this area, it is now required for the Court to again articulate the appropriate standard of preemption in cases such as this. As this Court observed in *Locke*, the typical "'assumption' of nonpreemption is not triggered where a state regulates in a realm where there has been a significant federal presence," id. at 108, and the general maritime law – including the commercial recovery of lost property on navigable waters – is surely one of these areas.

B. The state court's reliance on the Submerged Lands Act as the basis of title to sunken trees is manifestly contradicted by the statute and is in conflict with the rulings of other courts.

It appears that the Washington Supreme Court

believed, App. 7a-8a, that the State's assertion of title to sunken tree remnants – as distinct from stray logs – was supported by the federal Submerged Lands Act (SLA), particularly its provision defining natural resources, 43 U.S.C. § 1301(e); App. 53a, and the conditional grant of such resources to the State. See id. §§ 1311(a), 1314(a); App. 54a, 55a. This construction of the SLA is evidently in conflict with its text and the holdings of other courts that have considered the matter. If left unreviewed, Washington's use of its own state law to advance an eccentric interpretation of the SLA will give license to other states to do the same.[4] And, indeed, this will not be the first time that this Court has been required to exercise its supervisory power to correct an erroneous assertion by the State of Washington of its authority over submerged lands. See *Hughes v. Washington*, 389 U.S. 290 (1967) (question of ownership to accretions to beach property governed by federal, not state, law).

1. First, the Washington Supreme Court's extension of the "natural resource" language of section 1301(e) to the sunken trees found on Washington's submerged lands cannot bear close scrutiny, as the dissenters in that decision noted. See App. 14a-15a. Courts that have considered the issue have concluded that "natural resources such as oil and minerals were the main target of the legislation," and that this section was not likely intended to include forest resources that would somehow find themselves

---

[4] If this issue is left unresolved, one might well see the results in the initiation of actions in the original jurisdiction of this Court. Currently, the Court has on its docket one such case which may turn on the proper construction of the SLA, as implemented in the Alaska Statehood Act. See *Alaska v. United States*, Orig. 128 (motion for leave to file bill of complaint granted, June 9, 2000) (Counts III & IV).

under water on submerged lands (as in flood conditions). See *United States v. Michigan*, 471 F. Supp. 192, 247 (W.D. Mich. 1979) (citing 2 U.S.C.C.A.N. 1385 (1953)).

Indeed, the Washington Supreme Court's interpretation is clearly at variance with the "established interpretative canons of *noscitur a sociis* and *ejusdem generis*," "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001); see also *Gutierrez v. Ada*, 528 U.S. 250, 255, (2000) ("[W]ords. . . are known by their companions"). Under this canon, the itemized list of things recognized as "natural resources" in 1301(e) – oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life – "are all resources that grow or evolve naturally below water, rather than resources that once grew on dry land and then happened to end up beneath the surface by accident or natural disaster." App. 15a.

Based on the statutory text it is unlikely that Congress intended forest remnants that are not actually embedded in the submerged lands of a state be conveyed by the SLA. See also *United States v. Ray*, 423 F.2d 16, 21-22 (5th Cir. 1970) (ruling that coral reefs, even if dead, are included in the definition of "natural resources" because they are a typical aquatic feature). As further proof of this, federal legislation specifically authorizes regulation of log and tree salvage on applicable lands, and does not assume that this would be a normal incident of sovereignty. See, e.g., 16 U.S.C. § 3203(g) (2003) (in a provision applicable only to Alaska, "[w]ithin National Forest wilderness and national forest monuments des[ig]nated by this Act, the Secretary of Agriculture may permit or otherwise regulate the recovery and salvage of logs from coastlines.").

SLA section 1301(e) thus should not have been read by the Washington Supreme Court as a grant of title to either stray logs or sunken trees on Washington's submerged lands, absent proof of abandonment and embeddedness.

2. But even more fundamentally, the state court's interpretation of the SLA as a grant of title in a particular species of property lost on navigable waters, without reference to the applicable federal maritime laws of salvage and finds, runs afoul of the SLA's savings clause. This provides that reserved to the United States is "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce [and] navigation. . . ." Id. § 1314(a); App. 55a. No less an authority than this Court has ruled that section 1314(a) preserves the application of federal law to the commercial and maritime aspects of a state's use and regulation of submerged land resources. See *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 183-84 (1977) ("Since the grant of the fisheries license is made pursuant to the commerce power . . . the Submerged Lands Act did not alter its pre-emptive effect. Certainly Congress did not repeal by implication, in the broad language of the Submerged Lands Act, the Licensing Act requirement of equal treatment for federal licensees.") (citation omitted); see also *United States v. Louisiana*, 363 U.S. 1, 10 (1960).

The proper construction of the SLA, as raised in this case, thus implicates broad national concerns, especially in the relationship between state claims and the reserved power of the federal government (as jointly managed by Congress and the federal courts) to develop rules of conduct for maritime commerce. Petitioner will by no means suggest that states are to be hamstrung in their management of natural resources granted by the SLA. But where, as here, a state purports to

regulate and criminalize a traditional maritime activity, based on an assertion of ownership to property lost on navigable waters, that claim of title must be fully consistent with the general maritime law and Acts of Congress, and that appears to be precisely the legislative objective of the SLA's section 1314(a). If it were otherwise, those engaged in such maritime activities as salvage and recovery of property on navigable waters would face a patchwork quilt of non-uniform state regulations, the failure to observe which could have dire consequences.

One need hardly speculate about such results; the Petitioner faced those consequences, including the deprivation of his liberty. Petitioner's conviction was premised on the State of Washington's sweeping claim of title to the logs and trees Petitioner recovered, without any jury instructions or findings as to whether those objects were legally abandoned and actually embedded in Washington's submerged lands. Thus, contrary to the Due Process Clause, the State was improperly relieved of its obligation to prove one of the material elements of the offenses of theft and trafficking in stolen property: the taking of "the property of another." See *In re Winship*, 397 U.S. 358, 361 (1970). Petitioner's conviction was thus wrongful, and any legal consequences of it (including the duty to make restitution to the State) should be abated.

CONCLUSION

The Petition ought to be GRANTED.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record [5]
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

JAMES E. LOBSENZ
Of Counsel
Carney Badley Spellman, P.S.
700 Fifth Avenue, Suite 5800
Seattle, Washington 98104-5017
(206) 607-4305

Attorneys for Petitioner

July 8, 2003

---

[5] Counsel acknowledges the assistance of Marlie A. McDonnell in the preparation of this Petition.